STATE OF MICHIGAN

COURT OF APPEALS

CHYANTA LIVINGSTON,

Plaintiff-Appellant,

v

JAMES ALEXANDER SULLIVAN, IV and PROGRESSIVE MICHIGAN INSURANCE COMPANY

Defendants-Appellees.

UNPUBLISHED
October 10, 2013

No. 308434
Wayne Circuit Court
LC No. 09-016657-NI

ST. JOHN MACOMB-OAKLAND HOSPITAL,

Plaintiff-Appellant,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

No. 308530
Wayne Circuit Court
LC No. 10-011907-NF

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

This is a consolidated appeal involving cases that arose out of a May 22, 2008, automobile accident. Defendant James Alexander Sullivan, IV admitted to rear-ending plaintiff Chyanta Livingston at a red light. In docket number 308434, Livingston filed a third-party no-fault action against Sullivan as well as a first-party no-fault action against her insurance carrier, defendant Progressive Michigan Insurance Company. In docket number 308530, plaintiff St. John Macomb-Oakland Hospital sued Progressive seeking payment for medical bills incurred when Livingston sought medical treatment after the accident. Livingston's third-party action against Sullivan went to trial and the jury returned a verdict of no cause of action, finding that Livingston was not injured in the accident.

In docket number 308434, Livingston appeals as of right the trial court's ruling in her third-party action denying her motion for a directed verdict on the question of whether she was injured in the accident and the jury verdict of no cause of action in favor of Sullivan. She also appeals as of right the trial court's January 20, 2012, order granting Progressive's motion for summary disposition under MCR 2.116(C)(7) and dismissing her first-party no-fault action. In docket number 308530, St. John Hospital appeals as of right the trial court's January 20, 2012, order granting Progressive's motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissing St. John Hospital's action for payment of Livingston's medical bills. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

At about 5:00 p.m. on May 22, 2008, Livingston stopped at a red light at an intersection in Wayne County, Michigan. While Livingston was at the intersection, Sullivan rear-ended Livingston's car. Immediately thereafter, Livingston and Sullivan both drove to a nearby gas station, and Livingston called the police on her cellular telephone. Sullivan exited his car and asked Livingston if she was okay. According to Sullivan, Livingston responded that "she was a little shaken up but otherwise fine." Officer Chris Schaft arrived shortly thereafter and asked Livingston and Sullivan if they needed medical or hospital treatment; they both declined. Livingston and Sullivan each drove away from the scene of the accident

According to Livingston, she "started having body pain, aches" on the night of the accident; and on May 23, 2008, she went to St. John Hospital seeking medical treatment for her lower back. The St. John Hospital medical staff performed an x-ray of Livingston's spine, which did not reveal any injury. Subsequently, on July 19, 2008, Livingston had an MRI of her spine, which showed no abnormalities or evidence of an injury.[1] During the following months, Livingston saw various specialists, including Dr. Annette DeSantis, Dr. Frank Polinna, Dr. Stephen Mendelson, and Dr. Martin Kornblum. The record supports that Livingston's initial complaints focused on her lower back, but that in October of 2008, she raised an additional complaint of pain in her left shoulder. An MRI of Livingston's left shoulder indicated that she had a torn rotator cuff, and she underwent arthroscopic surgery in April of 2009. Livingston continued to complain of back pain, and a May 2010 MRI indicated that she had a tear in her lowest lumbar disc. She underwent back surgery in July of 2010.

Meanwhile, in July of 2009, Livingston filed a complaint that included a third-party no-fault claim against Sullivan and a first-party no-fault claim against Progressive. Livingston sought damages and insurance benefits for injuries she purportedly suffered in the May 2008 automobile accident. On October 13, 2010, St. John Hospital filed a complaint against Progressive, seeking payment of Livingston's medical bills for treatment of the injuries Livingston purportedly sustained in the accident. The trial court thereafter consolidated St. John Hospital's action against Progressive with Livingston's action against Sullivan and Progressive.

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[1] The MRI scan was "without evidence of disk herniation or spinal cord compression," there were "no vertebral body compression deformities or areas of subluxation," and there was "no herniated cervical or thoracic or lumbar disk." There was some early dehydration change of the disk at L5-S1.

In May of 2011, a jury trial commenced on Livingston's third-party action against Sullivan. At trial, Livingston, Sullivan, and the responding police officer all testified that at the time of the May 2008 accident, Livingston did not claim to have any injuries. Sullivan and the police officer further testified that they did not observe any injuries on Livingston immediately after the accident. The officer also testified that both Livingston's and Sullivan's respective vehicles sustained "very minimal" damage. Photographs of the vehicles were admitted at trial. Sullivan testified that his car "bumped" into Livingston's car at an estimated two or three miles per hour.[2] Conversely, Livingston testified that Sullivan was approaching her at 30 miles per hour and did not slow down. Dr. DeSantis testified that Livingston told her Sullivan was traveling at 30 or 35 miles per hour at the time of impact. John Wiechel, Ph.D. testified as an expert in mechanical engineering. According to Wiechel, after performing multiple calculations, he determined that the probable speed of Sullivan's vehicle at the time of impact was about six miles per hour. Wiechel further testified that it was not possible that Sullivan's vehicle struck Livingston's vehicle at 30 miles per hour given the limited damage to Livingston's vehicle.

Livingston testified that she had been involved in multiple automobile accidents before the May 2008, accident; and numerous medical records were admitted to support Livingston's accident history.[3] She also testified that she began receiving social security disability benefits in about 1996 for memory loss that she purportedly suffered as the result of a previous automobile accident. According to Livingston, she sought medical treatment for her lower back in connection with multiple previous automobile accidents. Livingston acknowledged that at numerous doctors' appointments before the May 2008 accident, she reported suffering from back and head pain. She and her sister each testified that Livingston had undergone back surgery before the May 2008 accident.[4] Livingston testified that the May 2008 automobile accident significantly limited the physical abilities she had previously enjoyed. However, she

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[2] According to Sullivan, the light turned green and he and Livingston each drove their respective vehicles forward. Sullivan glanced to the side momentarily, and when he looked back at the road he saw that Livingston had applied her brakes. He then applied his brakes, "but there was a light bump … contact between our vehicles."

[3] Livingston testified that she was involved in automobile accidents in 1989, 1992, 1994, 1995, 2001, 2005, and "a year or two before" the May 2008 accident. Medical records admitted at trial indicate that Livingston sought medical treatment for car accidents in 1989 (according to Livingston, this accident caused her to suffer lower back pain, a head injury, and memory loss), 1994 (a rear-end collision in which Livingston reported experiencing pain in her neck and lower back), 1995 (a head on collision in which Livingston complained of neck and knee pain), 2001 (Livingston complained of head, neck and back pain), and 2005 (Livingston complained of headaches and back pain). The medical records also reflect a 1998 presentation to the emergency department where Livingston complained of lower back pain after she had been "trampled over" by "multiple people" at a party.

[4] Livingston initially testified that before the May 2008 accident, she had not had any surgery on her left shoulder or her lower back; but she later testified that she "had several surgeries" on her lower back in 2004.

acknowledged that on her 2005 application for continuing disability benefits, she claimed to suffer similar physical limitations as the result of memory loss and headaches resulting from previous automobile accidents.[5]

The pretrial depositions of Dr. DeSantis, Dr. Polinna, Dr. Mendelson, and Dr. Kornblum were played for the jury. The foregoing doctors provided testimony supporting that Livingston suffered from back and shoulder injuries at the time the doctors treated her. The doctors testified that Livingston attributed her injuries to the May 2008 accident; and on the basis of this information, the doctors believed that the accident caused Livingston's back and shoulder injuries. However, the four doctors acknowledged that they were unaware that Livingston had suffered multiple previous automobile accidents and had consistently complained of back pain for years before the May 2008 accident. Dr. DeSantis specifically testified that Livingston denied being in involved any previous automobile accident; Dr. Kornblum testified that Livingston reported that she was not experiencing any back pain before the May 2008 accident and was fully functional; and Dr. Polinna testified that Livingston omitted her previous automobile accidents and injuries when providing her medical history.

At the close of proofs, Livingston moved for a directed verdict on the question of whether she suffered an injury "related to this accident." The trial court denied the motion, finding that there was a question of fact as to whether Livingston was injured in the May 2008 accident. Thereafter, the trial court gave the jury a verdict form that included as question one, "Was Chyanta Livingston injured?" The verdict form instructed the jury that if it answered "yes" to question one, it should then to proceed to question two — "Was the Defendant's negligence a proximate cause of Chyanta Livingston's injuries?" — but if the jury answered "no" to question one, it did not need to answer any further questions.

During deliberations, the jury posed the following question to the trial court: "What does the word 'injury' refer to in question #1? Does it refer only to this accident or to her overall medical history?" In response, the trial court gave the jury the following instruction: "Injury is given its ordinary meaning—was she injured in this accident—and in considering whether she was injured in this accident, you may consider whether the accident aggravated a pre-existing condition. Please read all of the jury instructions and read the verdict form for guidance." Thereafter, the jury entered a verdict of no cause of action in favor of Sullivan. The jury found that Livingston did not suffer an injury and, on the basis of that finding, did not answer any of the remaining questions on the jury verdict form.

Livingston subsequently moved for judgment notwithstanding the verdict or a new trial. After a hearing on the matter, the trial court denied Livingston's motion on October 5, 2011. Meanwhile, Progressive moved for summary disposition of Livingston's and St. John Hospital's

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[5] Livingston completed a disability function report in which she stated that her illness or injuries affected the following activities: "Lifting, squatting, bending, standing, reaching, walking, sitting, kneeling, talking, stair climbing, understanding, following instructions, and getting along with others." She also indicated that she was no longer able to enjoy any of her hobbies or interests.

pending first-party actions against Progressive. Progressive asserted that the jury's finding that Livingston was not injured in the May 2008 accident barred the pending actions against Progressive under res judicata or collateral estoppel. The trial court agreed, and granted summary disposition to Progressive.

II. ANALYSIS

On appeal, Livingston first argues that the trial court erred by denying her motion for a directed verdict on whether she was injured in the May 2008 automobile accident.[6] We disagree.

"When reviewing a ruling on a motion for a directed verdict, we [] consider the evidence and any reasonable inferences de novo in the light most favorable to the nonmoving party to determine whether there exists a question of fact on which reasonable minds could differ." *Alfieri v Bertorelli*, 295 Mich App 189, 192; 813 NW2d 772 (2012). "When considering a motion for a directed verdict, it is 'the factfinder's responsibility to determine the credibility and weight of trial testimony.'" *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008), quoting *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

"Although the no-fault act generally abolishes tort liability arising from the ownership, maintenance, or use of a motor vehicle, MCL 500.3135 provides several exceptions to the general rule." *Johnson v Recca*, 492 Mich 169, 175; 821 NW2d 520 (2012). Under MCL 500.3135(1), "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(3)(c) provides that an individual may be liable in tort, pursuant to a third-party action, for "[d]amages for allowable expenses,[7] work loss, and survivor's loss as defined in [MCL 500.3107 to MCL 500.3110] in excess of the daily, monthly, and 3–year limitations contained in those sections."

In this case, Livingston alleged in her third-party action that Sullivan's negligent driving proximately caused her to suffer serious injury and impairment of bodily function. At trial, Livingston moved for a directed verdict "on the issue of injury," arguing that the evidence indisputably established that she sustained an injury — specifically, a lower back injury and a torn rotator cuff — "related to this accident." Livingston renews this contention on appeal, arguing that "[t]he jury should not have been asked if Ms. Livingston was injured. Based on the evidence presented at trial, she clearly was injured to some degree in the collision." Livingston contends that the trial court should have granted her motion for directed verdict, omitted the

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[6] In its brief on appeal, St. John Hospital "adopts and incorporates" Livingston's statement of the issues presented and her arguments.

[7] MCL 500.3107 defines "allowable expenses" as "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." See *Johnson*, 492 Mich at 175.

injury question from the jury verdict form, and instructed the jury to proceed directly to the question of whether Sullivan's negligence proximately caused her injuries. For the reasons discussed below, viewing the evidence and any reasonable inferences in the light most favorable to Sullivan as the nonmoving party, we find that there was a question of fact on which reasonable minds could differ regarding whether Livingston sustained an injury in the accident. See *Alfieri*, 295 Mich App at 192.

Sullivan presented evidence supporting a finding that the accident was not severe and did not cause Livingston to suffer an injury. At trial, Livingston, Sullivan, and Officer Schaft testified that Livingston stated after the accident that she did not need medical assistance, and she did not claim to be injured. Moreover, Officer Schaft and Sullivan each testified that they did not observe any injuries on Livingston immediately after the accident. Officer Schaft further testified that the two vehicles sustained "very minimal" damage, which was consistent with Sullivan's testimony that he hit Livingston's car at two or three miles per hour and Dr. Wiechel's expert testimony that Sullivan's car was traveling at about six miles per hour at the time of impact.

The evidence of record also indicates that a question of fact existed regarding whether Livingston's purported injuries arose out of a previous event, rather than the May 2008 automobile accident. Livingston testified, and the medical records supported, that she had been involved in multiple automobile accidents before the May 2008 automobile accident. According to Livingston's own testimony, she sought medical treatment for her lower back in connection with multiple previous accidents. Livingston's medical records, psychiatric evaluations, work records, disability applications, and her own testimony established that she complained of back pain during the years preceding the May 2008 accident. Moreover, Livingston's medical records after the accident also raised a question of fact regarding whether she was injured in the accident. Livingston acknowledged that she did not seek medical treatment until the day after the accident. Neither her May 23, 2008, x-ray nor her July 2008 MRI showed any abnormalities or evidence of a back injury. And she did not begin complaining of left shoulder pain until October 23, 2008, which was five months after the accident.

Furthermore, the evidence of record called into question Livingston's credibility. According to Livingston's testimony and her representation to Dr. DeSantis, Sullivan rear-ended her car while traveling a speed of at least 30 miles per hour; but Dr. Wiechel testified that this was not possible, and he estimated that Sullivan's actual speed at the time of impact was about six miles per hour. Furthermore, although Livingston testified that the accident significantly limited the physical ability that she had previously enjoyed, she acknowledged that on her 2005 application for disability benefits, she claimed to suffer physical limitations consistent with those she was now claiming resulted from the May 2008 accident. Moreover, the record before the jury supported the inference that Livingston was disingenuous in her June 2008 application for first-party no-fault benefits related to the May 2008 accident when she stated that she had not previously received any medical treatment for the same or similar symptoms; in her January 2010 application for disability benefits when she falsely stated that she had not been employed since 2006; and in her statements to medical providers after the May 2008 accident when she denied being involved in previous automobile accidents or experiencing previous back pain.

Acknowledging that it was the jury's "responsibility to determine the credibility and weight of trial testimony," *King*, 278 Mich App at 522 (quotation omitted), we find that the evidence and reasonable inferences, viewed in the light most favorable to Sullivan, created "a question of fact on which reasonable minds could differ," regarding whether Livingston was injured in the accident, *Alfieri*, 295 Mich App at 192. Thus, the trial court properly denied Livingston's motion for a directed verdict. *Id*.

Livingston also argues that by erroneously including the "injury question" on the verdict form, the trial court effectively allowed the jury to decide the issue of causation in the guise of a question about whether she was injured, thus subverting the principles of proximate causation applicable to such decision. Livingston concedes that a jury may properly be asked to determine whether the plaintiff was injured in the accident "in some cases, depending on the actual evidence at trial." In fact, it is set forth in the standard jury instructions. M Civ JI 36.15. Moreover, Livingston cites no authority to support her alleged contention of error. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) ("Argument must be supported by citation to appropriate authority or policy."); *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996) ("A party may not leave it to this Court to search for authority to sustain or reject its position."). Regardless, Livingston's argument lacks merit. As discussed above, there was ample evidence before the jury to give rise to a reasonable question of fact regarding whether Livingston was injured in the accident. Thus, the trial court properly included the question on the jury verdict form.

Livingston next argues that the jury's finding that she was not injured in the accident was against the great weight of the evidence. We disagree. "When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses." *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006) (citations omitted). A verdict is against the great weight of the evidence only when the evidence preponderates so heavily against the verdict "that a miscarriage of justice would result from allowing the verdict to stand." *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). As discussed above, there was ample evidence before the jury supporting its finding that Livingston was not injured in the May 2008 automobile accident. Thus, on the record before us, the jury's verdict was not against the great weight of the evidence. *Allard*, 271 Mich App at 406-407; *In re Ayres*, 239 Mich App at 23.

Finally, Livingston and St. John Hospital argue that summary disposition as to their respective first-party actions against Progressive was improper because the jury finding on which the trial court relied was erroneous. We disagree.

Under Michigan's No-Fault Act, MCL 500.3101 *et seq.*, "insurance companies are required to provide first-party insurance benefits, referred to as personal protection insurance (PIP) benefits for certain expenses and losses." *Johnson*, 492 Mich at 173. However, insurance providers are only liable to pay benefits for bodily injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." *McPherson v McPherson*, 493 Mich 294, 296-297; 831 NW2d 219 (2013); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005). Here, the trial court granted Progressive's motions for summary disposition on the basis that Livingston's third-party action against Sullivan resulted in

a jury verdict that she was not injured in the May 2008 automobile accident and that neither Livingston nor St. John Hospital were entitled to relief from Progressive unless Livingston suffered an injury arising out of the accident.

On appeal, both Livingston and St. John Hospital challenge the trial court's grant of summary disposition on the sole basis that the jury's finding that Livingston was not injured in the accident should be reversed. Livingston and St. John Hospital simply contend that summary disposition is improper because the trial court erred in denying Livingston's motion for a directed verdict and that the jury's verdict was against the great weight of the evidence. Significantly, Livingston and St. John Hospital do not contend that they are entitled to proceed with their respective first-party actions if the jury properly determined that Livingston was not injured in the accident. Moreover, case law supports granting summary disposition as to first-party no-fault claims where a previous proceeding resulted in a final judgment on an issue that is necessary to the first-party action. See *Monat v State Farm Ins Co*, 469 Mich 679, 682-686, 695; 677 NW2d 843 (2004) (dismissing the plaintiff's first-party no-fault action under the doctrine of collateral estoppel because the plaintiff "was found not to have been injured in the [related] third-party action"); *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43-44; 795 NW2d 229 (2010) (dismissing health-care provider's first-party action under the doctrine of res judicata because a jury found that the injured individual did not have a first-party cause of action for PIP benefits). For the reasons discussed above, we find that Livingston's motion for a directed verdict was properly denied and the jury's verdict was not against the great weight of the evidence. We further find that summary disposition was proper as to Livingston's and St. John Hospital's respective actions against Progressive.

Affirmed.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro